Supreme Court, U.S.
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No. 92-737

In The

Supreme Court of the United States

October Term, 1992

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Petitioner,

v.

UNCLE BEN'S, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that § 101 of the Civil Rights Act of 1991, 42 U.S.C. § 1981(b), does not apply to cases pending on appeal on the Act's effective date.

2. Whether the court of appeals correctly ruled that intervening Supreme Court decisions on controlling legal principles rendered by this Court during the pendency of this case on remand to the district court were properly considered and applied by the district court and whether the intervening Supreme Court decisions justified any departure by the district court from the mandate of the earlier court of appeals' decision.

LIST OF PARTIES

The parties are those listed on the cover.

Uncle Ben's, Inc. is a wholly owned subsidiary of Mars, Inc.

Uncle Ben's, Inc. has no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

Thomas Johnson ("Petitioner") filed this suit in 1974 alleging that Uncle Ben's, Inc. ("Uncle Ben's" or "Respondent") discriminated against him and similarly situated Blacks and Mexican-Americans in violation of 42 U.S.C. § 1981. The complaint was amended in 1975 to add allegations under Title VII of the Civil Rights Act of 1964. Based upon the applicable limitation period for § 1981, Petitioner's claims were limited to the period commencing March, 1972.

At the end of Petitioner's direct case, all claims were dismissed except as to discrimination in promotion of Blacks. Thereafter, Respondent called its personnel manager and three experts. At the conclusion of Petitioner's direct examination of his expert rebuttal witness, but prior to cross-examination, the district court ruled for Respondent and subsequently entered detailed findings and conclusions.

The Fifth Circuit initially affirmed *per curiam*, but subsequently granted Petitioner's petition for rehearing, modified and affirmed in part, reversed in part, and remanded. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980) ("*Johnson I*"). Thereafter, this Court granted Uncle Ben's petition for writ of certiorari, vacated the Fifth Circuit's decision, and remanded the case in light of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *Uncle Ben's, Inc. v. Johnson*, 451 U.S. 902 (1981). On remand, the Fifth Circuit held *Burdine* inapplicable, and remanded the case to the district court for further proceedings as stated in *Johnson I. Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981) ("*Johnson II*").

Judge Sterling, the district court judge who originally tried this case and issued the opinion reviewed in *Johnson I*, died while the case was pending on remand. The case was then transferred to District Judge Lynn Hughes. On May 2, 1991, Judge Hughes granted judgment in favor of Respondent. As stated by the district court:

> The question on remand is: If promotion or upward mobility occurs at Uncle Ben [sic], do blacks suffer a disparate rejection rate in seeking promotions.[1] Although there is evidence that promotion does occur at Uncle Ben [sic], the impact Johnson described, taken most favorably to him, does not meet the requirements of the law. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Johnson's case fails on both the Title VII issues and the § 1981 issue.

Johnson v. Uncle Ben's, Inc., No. Civ.A. 74-H-435, 1991 U. S. Dist. LEXIS 19733 at *1 (S.D. Tex. May 2, 1991).

The Fifth Circuit affirmed. *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992) ("*Johnson III*"). As described by the court of appeals, the district court rendered judgment for Respondent because Petitioner failed to make a prima facie case of disparate impact and did not state an actionable claim under § 1981. *Id.* at 1366. The Fifth Circuit further described the district court's ruling:

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[1] The district court's statement of the question on remand is totally consistent with the Fifth Circuit's explanation that the remand was required because "[t]he district court frankly ignored deciding the questions of whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions." *Johnson I*, 628 F.2d at 425.

> The district court held that Johnson proved only that there was a "high percentage of Black employees at Uncle Ben [sic] in low-level jobs versus a low percentage of minority employees in high level jobs." Because Johnson failed to prove that low level employees were the appropriate pool of qualified persons in the relevant labor market, he failed to prove any disparate impact.
>
> The district court also found that Johnson failed to prove that any specific employment practice had a disparate impact upon the rate of Black promotion and that UBI had, in any event, rebutted any prima facie case by producing legitimate business reasons for its employment practices. Finally, relying on *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), the district court rejected Johnson's § 1981 claim, finding that the claim did not rest on discrimination in the formation of a new employment contract.[2]

Johnson III, 965 F.2d at 1366.

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[2] With respect to the § 1981 claim, the district court also stated: "In addition to proving a new contract, Johnson must prove that Uncle Ben['s] intentionally discriminated; proof of merely an adverse effect is not sufficient." *Johnson v. Uncle Ben's, Inc.*, No. Civ.A. 74-H-435, 1991 U. S. Dist. LEXIS 19733 at *3 (S.D. Tex. May 2, 1991). While Petitioner now argues that this Court should allow him to maintain his claims under § 1981, Petitioner neither challenged the "intent" requirement of § 1981 nor pointed to any factual findings that would even arguably suggest that Respondent intentionally discriminated against anyone. Indeed, although in the context of discussing Respondent's claim of disparate impact, the district court ruled that Respondent had produced evidence of specific, legitimate reasons why Johnson and similarly situated Black employees had not been promoted, and Petitioner "offered no evidence to rebut Uncle Ben's business reasons for its employment practices." *Id.*

The court of appeals reviewed and generally described the trial evidence presented by Petitioner. In this context, and with respect to Petitioner's Title VII claim of disparate impact, the Fifth Circuit commented:

> Statistical disparities between the relevant labor pool and UBI's work force are not sufficient. *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 800-801 (5th Cir. 1982). A plaintiff must offer evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989) (quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 108 S.Ct. 2777, 2788, 101 L.Ed.2d 827 (1988) (plurality opinion)). Johnson must also "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs and promotions because of their membership in a protected group." *Watson*, 108 S.Ct. at 2788-89; *Pouncy*, 668 F.2d at 801 ("The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force"). Absent "a systematic analysis of the racial effects of all promotional criteria for each rank," *Black Fire Fighters Ass'n v. City of Dallas, Texas*, 905 F.2d 63, [66] (5th Cir. 1990), Johnson cannot establish a prima facie case of disparate impact.

Johnson III, 965 F.2d at 1367.

The three employment practices Petitioner claimed to be challenging were (1) Respondent's "educational requirements," (2) Respondent's "subjective system of

promotion," and (3) Respondent's use of irrelevant employment tests. 965 F.2d at 1367. The Fifth Circuit concluded that with respect to each of the challenged practices Petitioner failed to establish a prima facie case.[3]

After a detailed discussion of the evidence concerning Uncle Ben's educational requirements, the court of appeals stated:

> Assuming without deciding that some job zones at UBI should be compared with other lower UBI job zones, we find a complete absence of evidence that UBI employees were barred by educational requirements from reaching higher levels of employment at UBI. The district court did not clearly err in finding that Johnson failed to show that these alleged educational requirements affected Black promotion.

965 F.2d at 1369.

With respect to the argument that Uncle Ben's allowed its supervisors to make promotion decisions subjectively and that this practice adversely impacted Black promotions, the Fifth Circuit ruled:

> Johnson has not offered any evidence that Blacks' allegedly smaller number of promotions was causally related to this subjectivity. This cannot suffice to establish a prima facie case. *Wards Cove*, 109 S.Ct. at 2124-25.

965 F.2d at 1369.

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[3] According to the Fifth Circuit, "Johnson was able to do little more than describe the content or application of the requirements. He failed *a fortiori* to show the specific effect that each had on Black promotions." *Johnson III*, 965 F.2d at 1367.

Finally, concerning Petitioner's allegation that Uncle Ben's "use of invalidated employment tests" had a disparate impact on Black employees seeking promotion, the Fifth Circuit concluded:

> Johnson presented no evidence of the effects of these tests on Black promotions. There was no testimony that Blacks performed more poorly on these tests than whites or that any Black employee was denied a promotion as a result of his performance on these tests. . . . Given the dearth of evidence on the effects of the various tests on Black promotion rates, we conclude that Johnson failed to establish any causal nexus between the scores and the alleged disparate impact.

965 F.2d at 1369.

The Fifth Circuit (as well as the district court) relied on this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and concluded that Petitioner's allegations of intentional discrimination were not actionable under 42 U.S.C. § 1981. 965 F.2d 1370-72. The district court reached this decision because Petitioner's allegations under § 1981 were based entirely on claims of discrimination with respect to wage increases and promotions – matters which involved "post-formation conduct of the employment relationship, rather than . . . the making or enforcing of a new contract." *Id.* at 1370 (quoting *Johnson*, 1991 U. S. Dist. LEXIS 19733, at *3 (S.D. Tex. May 2, 1991)). As to the promotions at issue, after reviewing the evidence the Fifth Circuit affirmed the district court's conclusion that "under the undisputed evidence there was no 'new and distinct relation between

employee and employer' within the meaning of *Patterson.*" 965 F.2d at 1372.[4]

While the appeal from the district court's opinion was pending before the Fifth Circuit, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ("1991 CRA"). The Act became effective November 21, 1991.

Before the court of appeals, Petitioner argued that certain sections of the 1991 CRA should be applied to this case: (1) Section 105, which pertains to the burden of proof in Title VII disparate impact cases; and (2) Section 101(b), which expands the definition of what constitutes the making and enforcement of a contract for § 1981 purposes. Petitioner also argued that the district court had entered findings that went beyond the mandate of the *Johnson I* court. The Fifth Circuit correctly rejected each of these legal arguments.

Concerning the burden of proof in disparate impact cases, the court of appeals noted that the 1991 CRA, 42 U.S.C. § 2000e-2(k), did not alter the "particularity"

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[4] In its opinion, the Fifth Circuit emphasized that Petitioner "presented little evidence of the precise nature of the promotions assertedly denied its class members." 965 F.2d at 1370. The court of appeals also noted that:

> Johnson's general contention that the promotions in this case involved "new and distinct relations" sits uneasily with his contention at trial that UBI's job zones represented routine steps in a sequential hierarchy in which work in each job zone gave the qualifications needed for the duties of the next zone.

965 F.2d at 1371.

aspect of *Wards Cove* as it applied to this case.[5] 965 F.2d at 1372. Accordingly, the Fifth Circuit held that application of the 1991 CRA would have no effect on the court's disposition of the Petitioner's Title VII disparate impact claim. *Id.* For this reason, the court of appeals stated there was no need to address whether the provisions of the 1991 CRA affecting Title VII disparate impact claims are retroactive. *Id.*

Recognizing that § 101 of the 1991 CRA would affect Petitioner's § 1981 claim if it applied retroactively to cases pending on appeal when the Act was enacted, the court of appeals did address this issue. The Fifth Circuit found that § 101 of the 1991 CRA should not be applied to a case pending on appeal that was filed and decided by the trial court before the enactment of § 101 and that arises out of conduct occurring before § 101's enactment. *Johnson III*, 965 F.2d at 1373-74. In reaching this finding, the court was persuaded by the unanimity of the other circuits on this issue and the general presumption against retroactive application of substantive laws. *Id.* at 1372-73.

With respect to Petitioner's argument before the court of appeals that the district court's findings went beyond the mandate of the *Johnson I* court, the Fifth

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[5] Section 105(a) of the Act, 42 U.S.C. § 2000e-2(k)(1)(B)(i) provides that "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice."

Circuit concluded that assuming, *arguendo*, they did, such a departure was justified based upon intervening Supreme Court decisions. *Johnson III*, 965 F.2d at 1370.

REASONS FOR DENYING THE WRIT

This case has a long and tortured history, spanning eighteen years of litigation. It has been the subject of numerous opinions and rulings from the district court to the Supreme Court. On three separate occasions, twice by the district court and with the most recent Fifth Circuit decision, final judgments have been rendered on the merits of this case. On each of these occasions the judgment of the court was that Petitioner's claim of racial discrimination failed. The questions now being advanced by Petitioner do not warrant or justify further review of this case.

The questions raised by this Petition were specifically addressed by the Fifth Circuit. The facts, applicable statutes, and controlling authorities, including decisions of this Court, were carefully considered by the court of appeals. Petitioner's arguments concerning retroactivity of the 1991 CRA and application of the mandate rule were rejected by the Fifth Circuit. The analysis and reasoning of that court is unassailable. Simply stated, the Fifth Circuit correctly decided this case.

I. The Courts of Appeal Have Uniformly and Correctly Concluded That § 101 of the Civil Rights Act of 1991 Does Not Apply Retroactively to Cases Pending on Appeal on the Date of its Enactment.

While the retroactivity question has been the subject of numerous decisions by the various courts of appeal,

the consistency of the rulings rejecting retroactive application of the 1991 CRA to cases pending on appeal at the time of its enactment is overwhelming.[6] The District of Columbia, Sixth, Seventh and Eighth Circuits have agreed with the Fifth Circuit's ruling that § 101 of the 1991 CRA is to be applied prospectively only. In fact, as to the precise question of whether § 101, which expands the scope of discrimination claims that can be pursued under 42 U.S.C. § 1981, is to be applied retroactively, the courts of appeals have uniformly answered no. *Gersman v. Group Health Ass'n*, No. 89-5482, 1992 U.S. App. LEXIS 2165 (D.C. Cir. Sept. 15, 1992); *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592 (5th Cir. 1992); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Holt v. Michigan Dep't of*

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[6] *Gersman v. Group Health Ass'n*, No. 89-5482, 1992 U.S. App. LEXIS 21615 (D.C. Cir. Sept. 15, 1992); *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592 (5th Cir. 1992); *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992); *Wilson v. Belmont Homes, Inc.*, 970 F.2d 53 (5th Cir. 1992); *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Holt v. Michigan Dep't of Corrections*, 974 F.2d 771 (6th Cir. 1992); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3257 (Oct. 5, 1992) (No. 91-2001); *Banas v. American Airlines*, 969 F.2d 477 (7th Cir. 1992); *Artis v. Hitachi Zasen Clearing, Inc.*, 967 F.2d 1132 (7th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992) (*reh'g denied*); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3261 (Oct. 5, 1992) (No. 92-248); *Huey v. Sullivan*, 971 F.2d 1362 (8th Cir. 1992); *Parton v. GTE North, Inc.*, 971 F.2d 150 (8th Cir. 1992); *Valdez v. Mercy Hosp.*, 961 F.2d 1401 (8th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) (*reh'g pending*).

Corrections, 974 F.2d 771 (6th Cir. 1992); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992); *Artis v. Hitachi Zasen Clearing, Inc.*, 967 F.2d 1132 (7th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3261 (Oct. 5, 1992) (No. 92-248); *Valdez v. Mercy Hosp.*, 961 F.2d 1401 (8th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) (*reh'g pending*).

After carefully considering the apparently inconsistent decisions of this Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) and *Bowen v. Georgetown Univ. Hosp.*, 109 S.Ct. 468 (1988), concerning statutory retroactivity, the Fifth Circuit concluded that retroactive application of § 101 is impermissible. *Johnson III*, 965 F.2d at 1373-74. Unlike some other provisions of the 1991 CRA, § 101 impacts the substantive rights, obligations and liabilities of employers. Fundamentally, § 101 makes illegal under § 1981 and imposes liabilities upon employers for post-formation employment conduct that was not previously illegal under § 1981. *Compare* 42 U.S.C. § 1981(b) *with Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). By expanding the scope of § 1981's prohibition, § 101 of the 1991 CRA provides employees with a cause of action that previously did not exist under that statute. There is no justifiable basis to apply § 101 retroactively and to thereby impose liabilities upon employers for conduct that was not illegal under § 1981 at the time it occurred.

In distinguishing *Bradley*, and as support for its decision to follow the more recent decision of this Court in *Bowen*, the Fifth Circuit was guided by the Court's reasoning and holding in *Bennett v. New Jersey*, 470 U.S. 632

(1985). In *Bennett*, this Court held that substantive provisions of amendments to the 1978 Amendments to the Elementary and Secondary Education Act cannot be applied retroactively. *Id.* at 638-40. Like this Court, Judge Higginbotham writing for the Fifth Circuit distinguished *Bennett* from *Bradley* noting that the rule in *Bradley* is limited by "another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Johnson III*, 965 F.2d at 1374 (quoting *Bennett*, 470 U.S. at 639). The court of appeals also emphasized that in *Bennett* this Court pointed out that *Bradley* concerned the allowance of attorney's fees under § 718 of the Emergency School Aid Act, 20 U.S.C. § 1617 – a *remedial* provision – not *substantive* obligations or rights under a statute. 965 F.2d at 1374.

Based upon this legal analysis, and after noting that the statutory language and legislative history of the 1991 CRA shed little light on the retroactivity question, the Fifth Circuit concluded:

> Section 101 affects substantive antecedent rights. Under *Patterson*, § 1981 did not prohibit discrimination in promotions before the enactment of § 101. Section 101 extended § 1981 to such discriminatory conduct. We then presume that § 101 does not apply to conduct that occurred before its enactment, absent clear evidence to the contrary. There is no such clear evidence.

965 F.2d at 1374.

As previously stated, there exists no conflict among the circuit courts on the question of whether § 101 can be

applied retroactively. However, one court of appeals, the Ninth Circuit, has held that § 113(b) of the 1991 CRA, which amended Title VII to allow for the recovery of expert fees as part of the costs, is retroactive. *Davis v. City and County of San Francisco*, No. Civ.A. 91-15153, U.S. App. LEXIS 24836 (9th Cir. Oct. 6, 1992) (*reh'g pending*). While the Ninth Circuit spoke in broad terms, the only issue before it was whether § 113(b) of the 1991 CRA – a remedial provision – should be applied to a case pending on appeal when the Act became effective. This limited ruling, which does not address the question now before this Court concerning § 101, does not warrant granting the petition in this case.

The Fifth Circuit's decision on the issue of the retroactivity of § 101 is narrow. It is well reasoned and consistent with rulings on this issue by other courts of appeals. It is correct. Little, if any, support for granting Petitioner's writ can be drawn from the Ninth Circuit's decision in *Davis v. City and County of San Francisco*, because that opinion fairly addresses only the retroactivity of § 113(b) – a remedial provision – and does not address the retroactivity of § 101 which "affects substantive antecedent rights."

II. In the Context of this Case, Whether or Not § 101 Should be Applied Retroactively is a Question of Academic Interest Only and, For this Reason, the Petition for Writ of Certiorari Should be Denied.

Although originally filed under § 1981, with claims under Title VII later added, in its present posture this is singularly a disparate impact case. Under controlling

legal precedent decided by this Court and unaffected by the 1991 Civil Rights Act, liability can be imposed under § 1981 only upon proof of purposeful discrimination – intent is required. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). The disparate impact model is inapplicable to § 1981 claims. *General Bldg. Contractors Ass'n*, 458 U.S. at 383, n.8 (A claim under § 1981 cannot be established by "proof of disparate impact alone."); *see also Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 111 (1st Cir. 1988) ("A plaintiff may not make a disparate impact claim under section 1981 since actions involving disparate impact can include practices which are neutral not only on their face but in terms of intent."); *Wilmore v. City of Wilmington*, 699 F.2d 667, 669-70 (3d Cir. 1983) ("The first and older theory under [Section] 1981 . . . and Title VII refers to the discriminatory treatment of minorities. This theory requires proof of discriminatory motive [citations omitted]. The second and more recent theory under Title VII *alone* is the "disparate impact" theory . . . . ") (emphasis added); *Irby v. Sullivan*, 737 F.2d 1418, 1424 n.7 (5th Cir. 1984) (intent required under § 1981).

The limited scope of Petitioner's claim as one of disparate impact alone is clear. In *Johnson I*, the Fifth Circuit remanded this case because, according to its analysis, the trial court's statement "the law does not say that the defendant shall not violate the rules of mathematical probability" was an incorrect assessment of the role of statistics in a Title VII case. *Johnson I*, 628 F.2d at 421. The court of appeals described Petitioner's theory in terms pertaining to a disparate impact case, *Id.* at 424; concluded that the district court had failed to answer the question of whether "blacks suffer a disparate impact in

seeking promotions," *Id.* at 425; and ultimately remanded with directions to "prepare new findings on discriminatory impact." *Id.* at 426.

Thereafter, when its judgment was vacated by this Court and remanded for further consideration in light of *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Fifth Circuit concluded its decision in *Johnson I* was not altered by *Burdine*. *Johnson II*, 657 F.2d at 751 (5th Cir. 1981). This conclusion was justified, according to the Fifth Circuit, because "[w]hile *Burdine* . . . affects the burdens of the parties in Title VII disparate treatment cases, it does not address Title VII disparate impact cases," *Johnson II*, 657 F.2d at 752, and "[t]he present case involves charges of disparate impact." *Id.* at 753. In reaching this determination, the court of appeals added the following footnote:

> *See also id.*, 450 U.S. at 255, 101 S.Ct. at 1094 n.8, where the Court stated that the allocation of burdens set forth in *Burdine* is suited to the task of "sharpen[ing] the inquiry into the elusive factual question of intentional discrimination." Because no question of intentional discrimination arises under the disparate impact theory, *Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977), the allocative scheme in *Burdine* was not formulated to develop the factual inquiry in a disparate impact case.

Johnson II, 657 F.2d at 752 n.2.

At least since the Fifth Circuit's 1981 opinion in *Johnson II*, Petitioner has fully embraced the position that his case is one of disparate impact – not one of intentional

discrimination. However, without regard as to whether § 105(a) of the 1991 CRA or the pronouncements by this Court in *Wards Cove* are controlling, the "particularity" requirement is unchanged, and on this basis the Fifth Circuit rejected Petitioner's disparate impact claim. *Johnson III*, 965 F.2d at 1369-70.

Now, with the demise of his disparate impact claim, Petitioner incorrectly argues that retroactive application of § 101 of the 1991 Civil Right Act would somehow revive his non-existent § 1981 claim. Petitioner's claims of intentional discrimination, which necessarily encompassed all allegations under § 1981, were disposed of by the Fifth Circuit's 1981 opinion in *Johnson II*. Assuming, *arguendo*, that § 101 applies retroactively, after *Johnson II* only disparate impact claims remained and such claims are not maintainable under § 1981. It is, therefore, respectfully submitted that the § 101 retroactivity question presented by Petitioner is, at most, an academic question only. Review by this Court is not justified as the ultimate outcome of this litigation would not be affected.

III. The Court of Appeals Properly Considered and Applied Intervening Supreme Court Decisions Even if, Arguably, this Amounted to a Departure from the Mandate of the Court of Appeals' Prior Decision.

Before the district court and, most recently, before the Fifth Circuit, Petitioner argued that his evidence of a statistical imbalance in the number of Blacks employed by Respondent in upper versus lower level positions in its workforce established a prima facie case of disparate

impact. Even if Petitioner properly identified the relevant labor pool, which he did not[7], such statistical disparities are not, and never have been, sufficient under this Court's rulings to establish a prima facie disparate impact case.

To circumvent this obvious failure of his burden of proof, Petitioner advanced before the Fifth Circuit the specious argument that the district court violated the mandate of the Fifth Circuit's prior opinion in *Johnson I* by considering intervening Supreme Court decisions and finding that a prima facie case had not been established. Now, before this Court, Petitioner claims that the Fifth Circuit violated its own mandate and impermissibly so.

The Fifth Circuit's response to this claim is obviously correct and, standing alone, demonstrates why this petition should be denied. The Fifth Circuit stated:

> We need not determine whether or not the district court's findings went beyond the mandate of the *Johnson I* court. Assuming *arguendo* that they did, we find that intervening Supreme Court decisions justified such a departure. The "mandate rule" is "a specific application of the 'law of the case' doctrine." *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985). Under this

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[7] The Fifth Circuit noted the district court's holding that "[b]ecause Johnson failed to prove that low level employees were the appropriate pool of qualified persons in the relevant labor market, he failed to prove any disparate impact." *Johnson III*, 965 F.2d at 1366. The Fifth Circuit further stated: "Johnson's data, . . . said little about *which* jobs at UBI were filled by promotion or, more importantly, from which jobs different UBI jobholders were promoted." *Id.*, at 1367.

> rule, the district court must follow an appellate decision on an issue in all subsequent trial proceedings unless the presentation of new evidence or an intervening change in the controlling law dictates a different result or if the appellate decision is clearly erroneous and, if implemented, would work an egregious result. *Falcon v. General Telephone Co.*, 815 F.2d 317, 320 (5th Cir. 1987).
>
> If the *Johnson I* court held that a disparity between the proportion of Blacks in UBI's workforce and the relevant labor pool of qualified applicants together with the use of challenged employment practices were sufficient to establish a prima facie case of disparate impact, it has been contradicted by the Supreme Court's decision in *Wards Cove*, the Supreme Court's plurality opinion in *Watson*, and this court's decision in *Pouncy*. As we have explained, Johnson must identify a causal nexus between a specific employment practice and a disparity in Black promotions. The district court did not err in following *Wards Cove* and requiring evidence that the particular challenged practices caused a disparity in Black promotions.

Johnson III, 965 F.2d at 1370.

CONCLUSION

Petitioner has not presented any questions justifying Supreme Court review. The extended history of this case should be ended. For the reasons set forth in this brief in

opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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